

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DURWOOD L. CURRIER,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 02-107-P-H
	)	
UNITED TECHNOLOGIES,	)	
CORPORATION,	)	
	)	
Defendant	)	

**RECOMMENDED DECISION ON DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT  
AND ORDER ON DEFENDANT’S MOTION TO STRIKE**

Plaintiff Durwood L. Currier contends that Defendant United Technologies Corporation discriminatorily eliminated his position at United Technologies Corporation’s Pratt & Whitney facility in North Berwick during a reduction in force carried out in June 2000. Currier’s Complaint recites four counts: (I) disparate treatment under the federal Age Discrimination in Employment Act (“ADEA”); (II) disparate treatment under the anti-age discrimination in employment provision of the Maine Human Rights Act (“MHRA”); (III) disparate impact under the ADEA; and (IV) disparate impact under the MHRA. Now pending are United Technologies Corporation’s (“UTC’s”) Motion for Summary Judgment and a companion Motion to Strike [Statements] from the Summary Judgment Record. I recommend that the Court grant the Motion for Summary Judgment with respect to Counts III and IV, but deny it with respect to Counts I and II. I also now deny Defendant’s Motion to Strike.

### **Summary Judgment Material Facts**

Summary judgment is warranted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002). The following facts are drawn from the parties’ Local Rule 56 statements of material facts, found in the court’s record at docket numbers 10 (Defendant’s Statement of Undisputed Material Facts), 13 (Plaintiff’s Opposing Statement of Material Facts) and 21 (Defendant’s Supplemental Statement of Undisputed Material Facts). The factual rendition presented herein differs in some regards from the factual presentations offered by the parties and could well differ from the findings a jury might make for three important reasons. First, the Court only credits a party’s statements of fact if the statements are supported by record citations and, even then, only to the extent that the cited materials actually support the party’s statements. D. Me. Loc. R. 56(e). Second, a statement offered by a party may or may not be material to the legal issues presented in a summary judgment motion; an immaterial statement is generally disregarded unless it provides information otherwise useful by way of background. Third, after it culls the summary judgment facts from the parties’ competing statements and the record materials cited therein, the Court is required to construe those facts in the light most favorable to the non-moving party and to indulge whatever reasonable inferences are raised in his or her favor. M. DeMatteo Constr. Co., 315 F.3d at 48.

Currier’s career with UTC began in October 1979 when he accepted employment with Pratt & Whitney (“Pratt”), a division of UTC located in North Berwick. Currier began his employment as an industrial engineer, then advanced to the position of Senior Industrial Engineer, then to Manager of Productivity Programs, and finally to the position of Unit Manager,

Manufacturing. (Docket No. 10, ¶ 1; Docket No. 13, ¶ 1.)<sup>1</sup> Currier worked as a Unit Manufacturer in Pratt’s Manufacturing Division between roughly 1987 and 1999. From 1987 to 1996, Currier was Unit Manager for Unit 8700. In 1996, Pratt transferred Currier to serve as Unit Manager for Unit 8100. (Docket No. 10, ¶ 2.) Currier’s performance in Unit 8700 helped turn the Unit around from lackluster performance to performance meeting or exceeding company objectives. (Docket No. 13, ¶¶ 2, 11.) Currier’s work in Unit 8100 was also commendable. In appreciation for his service, the then Plant Manager awarded Mr. Currier with a three-week jaunt to Japan. (Id., ¶ 2.) Pratt’s annual evaluations of Currier’s performance in Unit 8100 were, overall, positive for each of the years 1995, 1996 and 1997. (Id., ¶¶ 10, 11.)

In March 1998, Thomas Mayes transferred to Pratt’s North Berwick facility to serve as Operations Manager. Mayes remained in this position until January 2000, when Pratt promoted him to General Manager. (Docket No. 10, ¶ 3.) As Operations Manager, Mayes personally reviewed Currier and Unit 8100 for the year 1998. In his review, Mayes evaluated Currier in five major areas of responsibility—Cost, Quality, Speed, EHS and People. (Id., ¶ 12.) The scores Mayes gave Currier were as follows:

Cost: 2    Quality: 3    Speed: 5    EHS: 5    People: 4

The scoring scale used by Mayes went from 1 to 5, with 5 being the best possible score. In its memorandum and statement of fact, UTC highlights the fact that Currier received a 2 in the area of Cost. (Id., ¶ 13; Defendant’s Motion for Summary Judgment, Docket No. 9, at 8-9.) Currier’s (and Unit 8100’s) goal for 1998 was to reduce the cost per standard hour (“CPSH”) in Unit 8100

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<sup>1</sup> In its Supplemental Statement of Undisputed Material Facts, Docket No. 21, UTC offers “reply” statements that critique the qualifications and denials offered by Currier in his Opposing Statement of Material Facts, Docket No. 13. In many instances, Pratt attempts with these supplemental statements to introduce factual statements that are more elaborate than those it introduced in its original statement. See, e.g., Docket No. 21, ¶¶ 4, 11, 23, 25. These supplemental statements are not authorized by the Local Rule and have been purposefully ignored in connection with this Recommended Decision, except paragraphs 31-38 which appropriately respond to the additional statements offered by Currier. See D. Me. Loc. R. 56(d).

from 103.3 to 95.4. Currier's actual result for 1998 was a CPSH of 105.8, an increase rather than a decrease. (Docket No. 10, ¶ 13.) However, the evaluation itself indicates, "Unfavorable results caused by effect of L/T reductions." (Docket No. 13, ¶ 13.) This notation is a reference to another objective Currier and Unit 8100 were to achieve in 1998: reducing inventories and decreasing the lead time between the date a customer places an order and the date Pratt would manufacture the ordered products. These objectives fell under the area of Speed, for which Mayes ranked Currier with a 5. (Id.; Exh. E to Docket No. 10.) As Currier explains, "Shortening the period of time necessary to manufacture a product in Unit 8100 created a surplus of manpower in the short term. The excess labor drove up the 'cost per standard hour' in [Unit 8100]." (Docket No. 13, ¶ 13.) To adjust for this development, employees in Unit 8100 were temporarily loaned to other business units. (Id.) Still, according to Currier, the cost of the transferred employees remained on the books for Unit 8100.

In a separate 1998 assessment form, the "Competency Feedback Summary Sheet," Mayes gave Currier a 2 in relation to his demonstration of "forward thinking" and "business creativity" traits. (Docket No. 10, ¶ 14.) Notations indicate that, with regard to forward thinking, "Strategic plan negatively impacted one key metric over period of 1998." (Id.) It is impossible to discern from the parties' statements whether this notation favors Currier or UTC. Presumably, the strategic plan was Pratt's and, thus, to the extent it negatively impacted a "key metric" it may have chiefly contributed to the poor score rather than a lack of competency on Currier's part. Similarly, in relation to business creativity, a notation indicates, "Inventory reduction had significant impact to cost through the year." (Id.) Again, although UTC points to this notation in support of its motion, it is impossible to tell whether this notation favors or harms Currier, though Currier's explanation (not to mention the summary judgment standard) suggests that the appropriate inference should be a beneficial one.

Currier asserts that Mayes's 1998 evaluation of him reflects significant bias when compared to the evaluations Mayes gave other Unit Managers that year. (Docket No. 13, ¶ 16.) Notably, in the area of Quality, Currier received a score of 3. One of the stated goals he was to meet in that area was to "reduce DPM [defects per million] from 418 to 63." Currier's actual results were 133 DPM, an appreciable reduction, but still short of his objective. (Id.) Still, Mayes gave other managers the same or a higher score even though they all experienced significant increases in defects. (Id.) Although DPM reduction may have been only one factor for consideration for the other managers, and thus not "proof" of bias, this is the sort of fact that a jury might construe as evidence of bias. Other than this evidence, Currier considers Mayes to have treated him the same as other Unit Managers between roughly March 1998 and March 1999. (Docket No. 10, ¶ 19; Docket No. 13, ¶ 19.) There is no evidence that Mayes ever made any age-related comments to Currier. (Docket No. 10, ¶ 29.)

In 1999, Pratt transferred Currier to the newly created position of Unit Manager, New Business Development. In this position, Pratt expected Currier to create new business for Pratt and Currier understood that his performance evaluations would be directly tied to the volume of new business he generated. (Docket No. 10, ¶ 4.) However, Pratt was aware that Currier had no training or background in marketing and Pratt also failed to provide Currier with any stated goals or expectations. (Docket No. 13, ¶ 4.) According to Currier, when he would ask questions of Mayes, Mayes would not answer him and would turn and walk away. (Id., ¶ 20.) Nevertheless, Pratt awarded Currier a merit pay increase effective December 1, 1999. (Id., ¶ 4.) Currier would remain in the New Business Development position until Pratt eliminated the position and laid him off on June 15, 2000 during a reduction in force. (Docket No. 10, ¶ 5.)

In January 2000, Pratt promoted Mayes to the position of General Manager. (Docket No. 10, ¶ 3.) To fill the Operations Manager position vacated by Mayes, Pratt promoted the then

Unit Manager of Unit 8200, which promotion became effective sometime between February and June of 2000. (Docket No. 13, ¶ 27.) Additionally, in May 2000, within a month of terminating Currier, the Unit Manager of Unit 8500 resigned, thus creating a second vacancy within the Unit Manager ranks. (Id.) The vacancies were filled by men 15 and 20 years younger than Currier shortly before Currier's termination, at a time when Mayes was considering who would be impacted by the reduction in force. (Id.) The man who filled the Unit 8500 position was promoted and had no prior experience as a Unit Manager. (Id.) Notably, Mayes was aware of these positions when he was considering candidates for the reduction in force. (Id.)

The reduction in force was designed to terminate five people at the North Berwick facility. (Docket No. 10, ¶ 23.) In selecting Currier for termination, Mayes neither asked for nor received any assistance in evaluating employees. (Docket No. 13, ¶ 25.) Nor did Mayes endeavor to review any employment records or other documents to assist him in his determination. (Id.) Although there was no requirement that a Unit Manager position or employee be eliminated as part of the reduction in force (Id., ¶ 24), UTC argues<sup>2</sup> that Mayes ranked the eight North Berwick Unit Managers comparatively, intending to terminate the lowest ranked individual from the Unit Manager ranks. (Defendant's Motion for Summary Judgment,

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<sup>2</sup> UTC offers in its Statement of Undisputed Material Facts that Mayes utilized an "Employee Assessment Matrix" to evaluate Currier in relation to the other Unit Managers. The only record citation offered for these various statements are the documents themselves, but UTC did not authenticate the documents by affidavit or otherwise in its initial summary judgment filings. (Docket No. 10, ¶¶ 24, 25 & Exhs. J, K, L.) In his Opposing Statement of Material Facts, Currier presses a meritorious objection based on the lack of authentication. (Docket No. 13, ¶¶ 24, 25.) See also Snowden v. Millinocket Regional Hosp., 1989 U.S. Dist. LEXIS 17159, \*12-13, 1989 WL 200355, \*5 (D. Me. July 13, 1989) (quoting Hamilton v. Keystone Tankship Corp., 539 F.2d 684, 686 (9th Cir. 1976) ("Exhibits which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment."); Rathje v. Scotia Prince Cruises, Ltd., 2001 U.S. Dist. LEXIS 21266, \*9 n.6, 2001 WL 1636961, \*3 n.6 (D. Me. Dec. 20, 2001) (not crediting summary judgment statement of fact where "the document on which the plaintiffs rely is neither certified under seal nor otherwise properly authenticated"). UTC attempts to cure the oversight in the context of its Supplemental Statement of Undisputed Material Facts, Docket No. 21, by including an affidavit from Mayes and replying to Currier's qualifying statements. However, this sort of supplementation is clearly not contemplated by Local Rule 56(d), which strictly limits reply statements to addressing only the "additional facts submitted by the opposing party." I also note that UTC has not filed a motion to amend its initial statement. For these reasons, I have not incorporated UTC's statements concerning Mayes's use of the Employee Assessment Matrix for purposes of resolving UTC's summary judgment motion.

Docket No. 9, at 11.) There is no indication in the record why Mayes decided to eliminate one Unit Manager as opposed to no Unit Manager or as opposed to an employee in another position. And although UTC argues that Mayes chose Currier for termination based on a ranking, UTC's statement of facts asserts that "Pratt eliminated the position of Unit Manager, New Business Development." (Docket No. 10, ¶ 26 (emphasis added).)

An internal Pratt document entitled "Release Attachment," Exh. H to Docket No. 10, records who was selected and who was not selected from the pool of employees. It reflects that Currier was the only Unit Manager selected in the reduction. (Docket No. 13, ¶ 23.) The Release Attachment reveals that Currier, age 61, was older than the next eldest Unit Manager in North Berwick by roughly 9 years and that he exceeded the average age of the other Unit Managers by 17 years. (Id.)

On an undisclosed day in June 2000, Mayes informed Currier that his position was eliminated due to economic necessity. (Docket No. 10, ¶ 23.) At that time, Mayes suggested to Currier that a managerial position might be made available for him at a Pratt manufacturing plant in Chengdou, China, but no specific job offer was ever extended. (Id., ¶ 30.) At his deposition, Currier conceded that the elimination of the New Business Development position was sensible, based on his assessment that there was no real intention of devoting the necessary resources to make the position succeed. (Docket No. 13, ¶ 26.)

### **Discussion**

According to UTC, "The Court should enter summary judgment for Defendant because: (1) no admissible evidence supports Plaintiff's disparate treatment claims; (2) neither federal nor state law recognizes a cause of action for alleged disparate impact age discrimination; and (3) even if alleged disparate impact age discrimination were actionable, Plaintiff cannot proffer any admissible evidence to support such a claim." (Docket No. 9 at 6.)

## I. The Motion to Strike

UTC moves to strike “(1) any and all references to Plaintiff’s unreliable statistical analyses; (2) Plaintiff’s factual assertions not supported by the record as required by Local Rule 7 and Local Rule 56; (3) irrelevant matters; and (4) inadmissible hearsay.” (Defendant’s Motion to Strike [Statements] from the Summary Judgment Record, Docket No. 23, at 1.) None of the statements described in the first of the foregoing categories were considered in the context of this Recommended Decision. Similarly, many of the several statements identified by UTC as falling into the three other categories have not been considered in the context of this Recommended Decision. Therefore, the Motion to Strike is **DENIED** as moot with respect to these statements.

There are two statements that I have credited. The first concerns Currier’s performance in Unit 8700. In my view, Currier’s own testimony suffices to support the statement that his leadership of Unit 8700 turned the unit around from lackluster performance to performance meeting or exceeding company objectives. (Currier Depo. Trans., Docket No. 10, Ex. B, at 78.) In stating this “fact” in this way, I have exercised my discretion to edit the objected to factual statements offered by Currier in paragraphs 2 and 11 of his Opposing Statement of Material Facts so that they might correspond more nearly with the record references he cites and so that they are not stated any more grandiloquently than is necessary to challenge UTC’s contention that Currier had a history of poor performance at UTC. The relevance of this statement is obvious in light of the criticism UTC makes of Currier’s work history. The second statement I have credited is that the position of Unit Manager, New Business Development was “newly created” at the time when Currier was transferred to it. (Docket No. 13, ¶ 4.) In Currier’s deposition testimony, which he cites, Currier states that at the time of his transfer to the New Business Development position, “the then Plant Manager, Mike Robinson, explained that it was

a new position that was being tried out sort of thing.” (Currier Depo. at 82, lines 12-18.) How Currier’s statement violated Local Rule 56(c), the ground on which UTC presses its objection, is not apparent from UTC’s Motion to Strike.<sup>3</sup> Therefore, the Motion to Strike is also **DENIED** with respect to these final two objections.

## **II. Disparate Treatment Based on Age (Counts I and II)**

Both the Age Discrimination in Employment Act (“ADEA”) and the Maine Human Rights Act (“MHRA”) prohibit age discrimination in employment. 29 U.S.C. § 623(a)(1); 5 M.R.S.A. § 4572.<sup>4</sup> Currier’s disparate treatment claims (Counts I and II) are based on circumstantial or indirect evidence. Under either statute, such claims are assessed at the summary judgment stage in accordance with the familiar burden-shifting framework set out by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1995). See Gonzalez v. El Dia, Inc., 304 F.3d 63, 68 (1st Cir. 2002); Maine Human Rights Comm. v. City of Auburn, 408 A.2d 1253, 1261-62 (Me. 1979). The first burden of production is born by Currier. Because Currier claims that the reduction in force subjected him to disparate treatment

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<sup>3</sup> UTC’s Motion to Strike is unclear about why the “newly created” statement should not be considered. The Motion merely states that the statement violated Local Rule 56(c). If UTC means that the citation does not support the assertion that the position was “newly created,” that would be inaccurate. Currier’s deposition testimony clearly supports the assertion that the position was newly created when he occupied it. It may be that UTC does not believe Currier’s deposition testimony would be admissible, but in my view his deposition testimony relates an admission by a party opponent that would be admissible in evidence.

<sup>4</sup> The pertinent language of the ADEA reads:

- (a) Employer practices. It shall be unlawful for an employer--
  - (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . . .

That of the MHRA:

It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:

- A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of . . . sex . . . , or, because of [that] reason[], to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment . . . .

age discrimination, he must demonstrate the following four things: (1) that he was at least forty years of age; (2) that his job performance met UTC's legitimate expectations; (3) that UTC subjected him to an adverse employment action; and (4) that age was not treated neutrally in implementing the RIF, or younger individuals were retained in the same position. Ruiz v. Posadas De San Juan Assocs., 124 F.3d 243, 247-48 (1st Cir. 1997). Although a court might well pass over the prima facie case where the defendant has offered a legitimate, non-discriminatory basis for the adverse employment action that is at issue, see, e.g., Ruiz, 124 F.3d at 248; Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 70 (1st Cir. 1984), in this case errors in UTC's summary judgment statement of material facts deprive it of the factual material needed to support its burden of production in rebuttal. (See, supra, footnote 2.) Therefore, the adequacy of Currier's prima facie showing is determinative of UTC's motion. UTC challenges only elements 2 and 4 of the prima facie case.

*A. Currier succeeds in demonstrating his ability to meet legitimate expectations.*

UTC's first challenge "is akin to saying that [Currier] was not qualified to do the job." Oliver v. Digital Equipment Corp., 846 F.2d 103, 108 (1st Cir. 1988). Of concern in this case is whether "the job" at issue is the Unit Manager, New Business Development position in which Currier was employed at the time of the reduction in force or a Unit Manager position generally. UTC itself argues on both fronts at once. On the one hand, UTC argues that Currier did not satisfy its legitimate expectations because he increased cost per standard hour while working in Unit 8100 and because he failed to generate new business in the New Business Development position. (Docket No. 9 at 8.) On the other hand, the legitimate, nondiscriminatory justification UTC offers for terminating Currier is that Mayes ranked Currier at the bottom of the pool of Unit Managers in a ranking he allegedly created contemporaneously with the reduction in force. Although my view is that errors in the summary judgment papers should prevent the Court from

considering the latter contention, that contention nevertheless reveals that at the time of the reduction in force Currier was not viewed simply as the New Business Development man, who would stay or go depending on the fate of the New Business Development position, but as a Unit Manager equally positioned for one of the Unit Manager positions that might remain after the reduction in force.

With respect to the contention that Currier failed to meet expectations in Unit 8100, the evidence Currier offers could well support the contrary conclusion. UTC's 1998 evaluation of Currier specifically acknowledges that increases in Unit 8100's cost per standard hour were tied to other factors that positively impacted the company: decreased inventory and decreased lead time, for which he was ranked very highly. Furthermore, it appears that employees assigned to Unit 8100 in 1998 were often let out to other business units, although their labor costs were still tied to Unit 8100. With respect to the New Business Development position, UTC argues that Currier's failure is established by his own testimony. (*Id.*, at 8.) But contrary to UTC's representation, Currier does not concede that he failed to meet UTC's legitimate expectations for the New Business Development position. Rather, Currier's perspective is that the alleged expectations were nonexistent, because Pratt never provided Currier with stated goals or expectations,<sup>5</sup> or with an evaluation in 1999, and because Mayes refused to provide Currier with the support that was necessary to generate new business for the company. (Docket No. 13 at 7.) I further observe that UTC's decision to simply eliminate the year-old position as part of the reduction in force also suggests that the position was not one in which UTC placed any real store. Finally, despite the alleged shortcomings, Currier received a merit pay increase effective December 1, 1999, about six months before Mayes terminated his employment. These facts are

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<sup>5</sup> It appears that Unit Managers in North Berwick are painstakingly graded on at least an annual basis based, in large part, on the extent to which company-established goals are attained.

the sort from which a jury might conclude that the expectations UTC now asserts in the context of this litigation are more afterthoughts than “legitimate expectations.” Currier’s largely positive history with Pratt and his extensive experience as a Unit Manager generate a triable issue concerning his ability to meet the legitimate expectations for Unit Managers. See, e.g., Woodman v. Haemonetics Corp., 51 F.3d 1087, 1092 (1st Cir. 1995).

*B. Currier succeeds in demonstrating that age was not treated neutrally in implementing the RIF or that younger individuals were retained in positions for which he was considered.*

UTC argues that Currier cannot meet the fourth element of the prima facie case because he cannot show that an under 40 worker took the Unit Manager, New Business Development position, which was eliminated during the reduction in force. (Docket No. 9 at 9.) UTC also argues that Currier cannot carry his burden because, essentially, he cannot carry the ultimate burden of showing that the legitimate, nondiscriminatory reason UTC offers for his termination is a pretext for discrimination. (*Id.*) Both of these arguments misconstrue Currier’s burden at this stage. To make out a prima facie case, Currier need only show that younger workers were retained in the “position” at issue. Ruiz, 124 F.3d at 247-48. Currier meets this burden. UTC flatly asserts, albeit without proper evidentiary support, that it comparatively evaluated all Unit Managers, including Currier, to determine who would be impacted by the reduction in force. This alleged comparative evaluation would serve no purpose unless all of the Unit Managers were competing for the available Unit Manager positions.<sup>6</sup> As it happened, Currier, the eldest Unit Manager at age 61, was the Unit Manager impacted by the reduction in force. Not only is Currier within the protected class, but he was roughly 9 years older than the next eldest Unit

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<sup>6</sup> In other words, the fact that Pratt eliminated the New Business Development position does not preclude a finding that a younger Unit Manager is now occupying Currier’s “position.”

Manager and 17 years older than the average age of the other Unit Managers. This showing suffices to meet the prima facie standard.

*C. UTC does not meet its rebuttal burden of production.*

Under the McDonnell Douglas scheme, establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. To establish a “presumption” is to say that a finding of the predicate fact (here, the prima facie case) produces “a required conclusion in the absence of explanation” (here, the finding of unlawful discrimination).

St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (internal quotations and citations omitted). To overcome the presumption of discrimination, UTC must produce evidence of a legitimate reason for terminating Currier. Id. at 507 (“The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action.”) (quoting Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 254-55 & n.8 (1981)). What UTC offers up is a collection of unauthenticated documents identified as an “Employee Assessment Matrix.” According to UTC, the matrix reveals how Mayes ranked Currier last among Unit Managers based on objective criteria. However, as discussed in footnote 2, supra, UTC failed to authenticate these documents or to provide or point to any testimony made under oath or penalty of perjury that might independently support this factual assertion. Nor could these documents, standing alone, support the statement that Mayes “used the Employee Assessment Matrix” or how or why he used it. (Docket No. 10, ¶¶ 24, 25.) For that reason, I conclude that UTC fails to rebut the presumption of discrimination and that its Summary Judgment Motion should be denied.

*D. Resolution of the Motion for Summary Judgment does not require the Court to evaluate the ultimate issue.*

Because I am of the view that UTC cannot succeed with its summary judgment motion for failing to properly support its motion with admissible evidence, I have purposefully refrained from evaluating whether the hand presented by Carrier in his summary judgment filings could suffice for a finding of employment discrimination. Pursuant to Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000), Carrier would be entitled to have his case submitted to the jury if the evidence he produces at trial establishes the elements of the prima facie case and presents more than a “weak issue of fact” as to whether UTC’s legitimate, nondiscriminatory explanation is false. Id. at 148.

### **III. Disparate Impact Based on Age**

UTC moves for summary judgment against Counts III and IV on the ground that neither the ADEA nor the MHRA impose liability for age discrimination claims based on disparate impact. With respect to the ADEA claim (Count III), the Court of Appeals has held that the ADEA does not impose liability for disparate impact. Mullin v. Raytheon Co., 164 F.3d 696, 703-04 (1st Cir.), cert. denied, 528 U.S. 811 (1999).<sup>7</sup> Mullin, of course, binds this Court and summary judgment should therefore enter against Count III. With respect to the MHRA claim (Count IV), the Law Court has yet to resolve the matter. However, the Law Court has repeatedly shown its intention to follow federal precedent when treating age discrimination claims brought pursuant to the MHRA. See French v. Bath Iron Works Corp., 45 F. Supp. 2d 69, 72-73 (D. Me. 1999) (citing cases). For the reasons expounded upon by Judge Carter in French, I recommend that summary judgment enter against Count IV as well.

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<sup>7</sup> But see Campbell v. BankBoston, 2003 U.S. App. LEXIS 4027, \*25 n.9, 2003 WL 834720 (1st Cir. Mar. 7, 2003) (describing Mullin as merely reflecting the Circuit’s “doubt” as to whether disparate impact claims are actionable under the ADEA).

## **Conclusion**

For the reasons stated herein, I **RECOMMEND** that the Court **DENY**, in part, and **GRANT**, in part, Defendant's Motion for Summary Judgment. UTC has failed to muster the facts necessary to rebut Currier's prima facie case of disparate age treatment and, thus, judgment should not enter against Counts I and II. But with his claim of disparate age impact Currier has failed to state a claim for which relief can be granted and, thus, judgment should enter against Counts III and IV. Finally, for the reasons stated herein, I also now **DENY** Defendant's Motion to Strike.

## **NOTICE**

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: March 11, 2003

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Margaret J. Kravchuk

**MAGRECUSED, BANGOR, STANDARD**

United States Magistrate Judge

**U.S. District Court  
District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 2:02-cv-00107-DBH  
Internal Use Only**

CURRIER v. UNITED TECHNOLOGIES  
Assigned to: JUDGE D. BROCK HORNBY  
Referred to:

Date Filed: 05/10/02  
Jury Demand: Plaintiff  
Nature of Suit: 442 Civil Rights: Jobs

Demand: \$0  
Lead Docket: None  
Related Cases: None  
Case in other court: None  
Cause: 29:621 Job Discrimination (Age)

Jurisdiction: Federal Question

**Plaintiff**

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